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DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

ORIGINAL

JOHN S. LOGAN
DIRECT DIAL 202-776-2640
jlogan@dlalaw.com

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

January 14, 2005

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VIA HAND DELIVERY

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Federal Communications Commission
Office of Secretary

Re: Notification of Ex Parte Communication
MM Docket No. 00-167

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that on January 13, 2005, the members and guests of the Mass Media Practice Committee and the Cable Practice Committee of the Federal Communications Bar Association (the "FCBA Committees") met with the following members of the Commission's staff at a Brown Bag Lunch presentation sponsored by the FCBA Committees and held at the offices of Dow Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue, NW, Washington, D.C. 20036: Barbara Kreisman, Division Chief, Video Division, Media Bureau; Mary Beth Murphy, Division Chief, Policy Division, Media Bureau; and Kim Matthews, Attorney Advisor, Policy Division, Media Bureau.

At the Brown Bag Lunch presentation, the above-listed Commission staff members addressed questions regarding the interpretation and implementation of the Commission's *Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 00-167* submitted in advance by members of the FCBA Committees and responded to follow-up questions. A list of those attending the Brown Bag Luncheon is attached as Attachment A. A list of the questions addressed by the participating Commission staff members is attached as Attachment B. An audio recording of the meeting is enclosed.

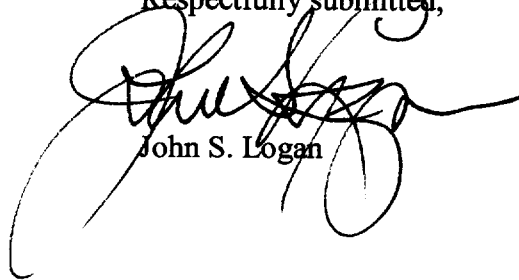
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Marlene H. Dortch, Esquire
January 14, 2005
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Please inform me if any questions should arise concerning this notice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John S. Logan", is written over the typed name. The signature is stylized with large, flowing loops and a long horizontal stroke extending to the left.

John S. Logan

JSL/vll

Enclosure

cc: Ms. Barbara Kreisman
Ms. Mary Beth Murphy
Ms. Kim Matthews

Federal Communications Bar Association
Brown-Bag Luncheon Sign-in Sheet
January 13, 2005

Name:	Organization:	FCBA Member (Y/N?):	Email:
Vince Pepper	Womble Carlyle	Y	VPepper@wcsr.com
Steven Teplitz	Time Warner	Y	steven.teplitz@timewarner.com
Susan Mort	Time Warner	N	susan.mort@timewarner.com
Gregg Skall	Womble Carlyle	Y	GSKALL@wcsr.com
John Logan	Dow Lohnes	Y	jlogan@dowlohn.com
Frank Jazzo	Fletcher, Heald & Hildreth	Y	jazzo@fhhlaw.com
Cristina Pauze	Morrison & Foerster	Y	cpauze@mofo.com
Margaret Tobey	Morrison & Foerster	Y	mtobey@mofo.com
Molly Pauker	Fox	Y	mollyp@foxtv.com
Grif Johnson	Paul Hastings	Y	johngriffithjohnson@paulhastings.com
Jeff Gee	Dow Lohnes	Y	jgee@dowlohn.com
Diane Burstein	NCTA	Y	dburstein@ncta.com
Jill Luckett	NCTA	Y	jluckett@ncta.com
Dan Kirkpatrick	Dow Lohnes	Y	dkirkpatrick@dowlohn.com

Please use additional sheets as necessary and fax all forms to the FCBA, (202) 293-4317, at the conclusion of the meeting. Please also fax any materials that were distributed at the meeting. Thanks.

Name:	Organization:	FCBA Member (Y/N?):	Email:
Anne Swanson	Dow Lohnes	Y	aswanson@dowlohnesh.com
Melodie Virtue	Garvey Schubert Barer	Y	mvirtue@gsblaw.com
Amy Wolverton	Discovery Communications	Y	amy-wolverton-cw@discovery.com
Dionne Smith	Capitol Broadcasting	Y	dsmith@cbc-raleigh.com
Nam Kim	Dow Lohnes	Y	nkim@dowlohnesh.com
Melissa Marshall	Dow Lohnes	Y	mmarshall@dowlohnesh.com
Kimberly Jones	Dow Lohnes	N	kjones@dowlohnesh.com
Joshua Guyan	SBCA	Y	jguyan@sbca.org
Kimberly Lacey	Shaw Pittman LLP	Y	kimberly.lacey@shawpittman.com
Kathryn Schmeltzer	Shaw Pittman LLP	Y	kathryn.schmeltzer@shawpittman.com
Valerie Schulte	NAB	Y	vschulte@nab.org
Barbara Gardner	Leventhal Senter & Lerman	Y	bgardner@lsl-law.com
Tim Tobin	Cole, Raywid & Braverman	Y	ttobin@crblaw.com
Katrina Gleber	Leventhal Senter	Y	kgleber@lsl-law.com

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Name:	Organization:	FCBA Member (Y/N?):	Email:
Robert Paul Sagner	Leventhal Senter & Lerman	Y	rsagner@lsl-law.com
Jean Benz	Leventhal Senter	Y	jbenez@lsl-law.com
Susan Fox	Disney	Y	susan.fox@disney.com
Anne Lucey	Viacom	Y	anne.lucey@viacom.com
Holly Saurer	Drinker Biddle	Y	holly.saurer@dbr.com
Ellen Agress	Fox	Y	eagress@newscorp.com
Sally Buckman	Leventhal Senter	Y	sbuckman@lsl-law.com
David Oxenford	Shaw Pittman	Y	david.oxenford@shawpittman.com
Patricia Chuh	Sciarrino Assoc.	Y	pchuh@sciarrinolaw.com
Jerianne Timmerman	NAB	Y	jtimmerman@nab.org
Jane Mago	NAB	Y	jmago@nab.org
Larry Walke	NAB	Y	lwalke@nab.org
David O'Connor	Holland & Knight LLP	Y	doconnor@hklaw.com
Jared Sher	Skadden	Y	jsher@skadden.com

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Name:	Organization:	FCBA Member (Y/N?):	Email:
Mick Tuesley	Skadden	Y	mtuesley@skadden.com
Joe DiScipio	Cohn and Marks	Y	joseph.discipio@cohnmarks.com
Kevin Latek	Dow Lohnes	Y	klatek@dowlohn.com
Ronnie London	Davis Wright Tremaine	Y	ronnielondon@dwt.com
Josh Roland	Wilmer, Cutler, Pickering	Y	josh.roland@wilmerhale.com
Anne Harden	Wilmer, Cutler	N	anne.harden@wilmerhale.com
Ron Siegel	Cohn and Marks	Y	ron.siegel@cohnmarks.com
Linda Carducci	Gannett Co.	N	lcarducci@gannett.com
Chris Tygh	Akin Gump	Y	ctygh@akingump.com
Natalie Roisman	FCC – Media Bureau	Y	natalie.roisman@fcc.gov
Rebecca Schillings	WBK	Y	rschillings@wbklaw.com
Ken Satten	WBK	Y	ksatten@wbklaw.com
Chris Ornelas	WBK	Y	cornelas@wbklaw.com
William D. Silva	Law Offices of William Silva	Y	bill@luselaw.com

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Name:	Organization:	FCBA Member (Y/N?):	Email:
Bert Carp	Williams & Jensen	Y	bwcarp@wms-jen.com
Robert Kidwell	Mintz Levin	Y	rgkidwell@mintz.com
Bruce Sokler	Mintz Levin	Y	bsokler@mintz.com
Michael Haas	Mintz Levin	Y	mthass@mintz.com
Martha Heller	Wiley Rein	Y	mheller@wrf.com
Nia McDonald	Wiley Rein	Y	nmcdonald@wrf.com
Kathy Kirby	Wiley Rein	Y	kkirby@wrf.com
Marnie Sarver	Wiley Rein	Y	msarver@wrf.com

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QUESTIONS FOR JANUARY 13 BROWN BAG LUNCHEON

EFFECTIVE DATES

- Please clarify the effective dates with respect to the airing of educational programming on digital stations. Paragraph 22 states that the "revised digital programming guideline" will become effective one year from release of the Report and Order, or November 23, 2005. Paragraph 70 says that the "revised safe harbor processing guideline" will become effective on January 1, 2006. Paragraph 86 defines the revised safe harbor guideline as Note 3 to the rule. Note 3 to the rule includes the obligation to air three hours per week of programming on the main digital channel, to air additional increments of programming based on the amount of additional programming aired on alternative streams, and the requirement that no more than 50% of programs may be repeated in a week to qualify as core. Accordingly, it is not clear what becomes effective on the November 23, 2005 date as opposed to the January 1, 2006 date.

FORM 398

- When they revise the Form 398, will they also revise it so that we can delete a program in the middle of a section? Currently, we can only delete the last program title in a section. This problem arises when you start with a prior quarter's report that you want to update for the next quarterly report. Let's say the station has dropped program title 2 out of 6 titles since the prior quarter. The only way to clean up the report is to cut and paste titles 3 - 6 in titles 2 - 5, or cut and paste title 6 into title 2 (which would mean you've lost the nice clean listing of reporting the shows in the order in which they appear on Saturday mornings).

WEBSITE

- After February 1, 2005, let's say a station has a website address displayed in a program, and the website does not comply with the new rule [Section 73.760(b)] . My understanding is that it then counts as commercial time. If the website address is displayed for 5 seconds, am I correct that it counts as 5 seconds of commercial time or does it poison the entire program and make it a program length commercial? [I know that characters from the program selling on the website will do that under the host selling rule, anyway.]
- If a website is "announced" (audio only) as opposed to displayed on screen, does that mean the same thing for purposes of the rule - i.e., audio only = displayed?
- Does the Commission have any definition of "primarily intended for a commercial purpose" under prong two of the four-prong website test, especially given that most websites are run by commercial enterprises or even

noncommercial enterprises with the hope of gaining some revenue eventually from the sites?

- Please clarify the penalty for airing a non-compliant website address during programming or during a commercial.
- Please clarify what constitutes host-selling on a website. Could a station air a commercial for a large national shoe store chain that merely displays the chain's website address (rather than overtly directs viewers to the website for more information) if in browsing the website one could find a sneaker for sale that displays a picture of a children's character? Similarly, if a video game commercial airs that does not contain any program characters but displays the company's website address on which one can find information about hundreds of game cartridges, including ones that feature program talent, does the station have to reject the spot? Does the character have to be one that appears on the station?

DTV/ FORMAT

- A station that simulcasts its analog signal in two digital formats, HD and SD, does not run afoul of the new 50% no-repeat rule. Is that correct?
- Does utilizing an unused multicast channel to air 3 hours of core programming incurred by another multicast channel trigger an additional obligation, *e.g.*, ½ hour for the otherwise unused channel?
- For the application of the new rules to multicast channels, how do the rules apply to channels that use almost all time-shifted repurposed content, but that air some new content as part of a mix of repurposed and new content? Would the three-hour rule apply? Would the 50% repeat rule apply?

MVPD CARRIAGE

- What constitutes MVPD carriage, *e.g.*, is it cable carriage by a majority of the market? Or is 100% required?
- Does MVPD carriage require DBS participation?
- The general question - how do multiple multichannel providers (with differing DTV carriage arrangements) in the market affect a station's ability to shift core programming from one multicast stream to another?
- A cable company picks up a station's 24/7 weather channel via fiber. The cable company has been doing this for years, prior to the station's airing of a digital

signal. The station now carries the same 24/7 weather on one of its digital streams. The cable company still carries the weather via the fiber feed, and not the HD stream. Question: The station's 24/7 HD weather stream obligates the station to carry an additional 3 hours of children's programming. For purposes of determining where to carry these 3 hours (i.e., what other streams would have "comparable carriage"), is the 24/7 weather channel considered to have "cable carriage" (because the weather is considered on the cable system, even though its from a fiber and not the HD stream) or not?

PREEMPTIONS

- Does the 10% preemption limit apply on a per-program basis or apply to the total amount of core programming per quarter?
- What does the Commission mean when it said that the 10% preemption bar will be measured quarterly, but that the six month measurement of the processing guideline would provide broadcasters some flexibility
- The FCC stated that it will limit the number of preemptions to no more than 10% of core programs and each preemption beyond the 10% limit will cause that program not to count as core under the processing guideline, even if the program is rescheduled. The first question is how to apply the 10% limit.

Example: A TV station airs 6 different half hour E/I programs (Programs A, B, C, D, E, and F) each week for 13 weeks during a quarter. Thus, it would air a total of 78 half-hour episodes (6 x 13 weeks) during that quarter.

Is the 10% preemption limit calculated and applied by looking at the total number of E/I episodes during the quarter (78 in the example above) and allowing the licensee to allocate its "basket" of preemptions among the programs? For example, under this scenario, during a quarter, the licensee could preempt and reschedule its E/I programs up to 7 times (10% of 78 episodes is 7.8) while still counting the programs as core. The licensee could allocate its 7 preemptions by preempting Program A for a total of 5 times during the quarter, Program B a total of 2 times during the quarter, and Programs C, D, E, and F a total of 0 times during a quarter, and thereby meet the 10% limit.

In the alternative, is the 10% preemption limit applied to each program such that only one episode of Program A can be preempted and rescheduled during the quarter (because 10% of 13 weeks is 1.3), only one episode of Program B can be preempted and rescheduled during the quarter, only one episode of Program C, etc.?

Please advise regarding how to calculate and apply the 10% limit.

- This next question requests clarification regarding the effect of preemptions in excess of the 10% limit on the calculation of average core hours of programming.

In its decision, the FCC said that each preemption beyond the 10% limit will cause that program not to count as core under the processing guideline, even if the program is rescheduled. Does this mean that the particular 1/2 hour program episode that was preempted will not count as core or that the entire program series is disqualified from counting as core? For example, if Program A is scheduled to air each week for 13 weeks and is preempted in excess of 10%, would the individual episodes of Program A that were preempted be disqualified from counting towards core hours or would Program A in its entirety (e.g., all episodes that aired during the quarter, even those at the regularly scheduled times) be disqualified from counting towards core hours?

- Because the FCC has determined compliance with the children's programming requirements based on six-month increments, does the 10% preemption rule mean that stations can preempt up to 3 times during those 26 or 27 weeks without jeopardizing the ability to characterize a program as core? (i.e., can the stations round up and will the FCC in fact continue to apply the six-month standard?)
- The Report and Order states that under the 10% standard, a program that is preempted more than 10% of the time will not be counted towards core requirements even if it is rescheduled. Would a station nevertheless be given some partial credit for airing the rescheduled program?
- Please clarify that stations have the discretion to calculate the 10% preemption limit on either a per-program or totality of programming basis. Using a per-program basis, each program can be preempted 1.3 times during a 13-week quarter. On a totality of programming basis, 10% of station's children's programs can be preempted, without regard to which series are involved. This will make it easier to calculate permissible preemptions where a series ends or begins during the quarter and the 1.3 times would be hard to figure out.

E/I – PROMOTIONS – COMMERCIAL LIMITS

- If a non-E/I children's show promotes its own next episode, does that promotion count as commercial time? If so, do you count only the time devoted to the promotion itself, or does it turn the "promoting" program into a program length commercial?
- The Order (para. 46) imposed a requirement that stations air the "E/I" symbol throughout programming. Will the FCC give any additional requirements for the airing of the E/I symbol, such as color, dimensions, where it is to be placed on the screen? Does the E/I symbol air during commercials, or just during the programming?

- How will the FCC qualify shows as educational and informational for the cable promotion/commercial rules? What does it mean that the "core" rules don't apply? Will this be "E/I light"? Will shows have to qualify on a per-episode or per-series basis?
- How does the Commission plan to treat voice-overs at the end of children's programming asking viewers to "tune into the next episode" or to "stay tuned for the next show"? If they are treated as commercial time, shouldn't there at least be an exclusion from the host-selling or separation rules for these types of promotions?
- Please clarify what discretion stations have in creating the E/I icon. Can it appear on top of an open book design, for example?

REPEATS

- The Order (para. 23) said that core programming that airs on both the analog and digital stream is not considered "repeat" programming "during the digital transition." How is "transition" defined? Does "transition" mean the time until each particular station returns its analog station?
- The Order (para. 23) said that programming that is "time shifted" from one stream to another stream is not considered repeat. If a station airs core programming from 8-11 am on Saturday on its main digital stream, and then airs the same programming from 12-3 on Sunday on an additional stream, is the 3 hours of Sunday programming considered "time-shifted" and therefore not a repeat? Does the entire 24/7 lineup need to be replayed in order for this "time shifting" exemption to apply?
- A station airs programming on its analog station that would be considered core except for the fact that it is not aired in the 7 am - 10 pm time frame. The station therefore does not include it as "core" programming on its analog station. The station airs the same programming on its digital stream during the 7 am - 10 pm time frame, and it qualifies as "core." Presumably, the station can count the programming airing on the digital stream as "core" programming, even though it is a repeat of non-core programming on the analog station. Is this correct?
- Under the new 50% repeat bar, could a broadcaster delay their children's block by eight days (or more likely by two weeks) and air the block on their multicast channel and comply with the 50% bar?
- For the application of the new rules to multicast channels, how do the rules apply to channels that use all repurposed content, but that don't time-shift the entire programming stream of another channel 100% in pattern (e.g., some content is aired twice, some only once, and some content from the first channel is never

aired on the multicast channel). Would the three-hour rule apply? Would the 50% repeat rule apply?

CABLE

The first question is of general application not just to cable, but my clients have asked it: The Order says of Internet websites that if they meet certain requirements they will be considered not to push the commercial time limits over the CTA limitations (paragraph 28). But the rule, whether for broadcast or cable, does not say this. It says "The display of Internet Web site addresses during program material is permitted only if the Web site:..... The rule seems to be a flat prohibition on web site addresses that do not meet these criteria, and that is how some clients have interpreted it and are busy scrubbing their websites off their programs even if they come nowhere close to the CTA limits even if they were to include the time devoted to the website address (say, for example, for a few seconds in a closing credit) since the rule does not in fact say such website addresses will be treated this way or that under the CTA limits, only that they are only "permitted" only if they meet certain criteria..

2. How does the FCC plan to treat a short separate segment between noncommercial childrens' programs on a non-ad supported pay TV cable network that suggests visiting the network's own website that has games and other noncommercial content but also previews of and promos for the network's other programs? What if the programs without commercials it bookends. do not fill a full hour, and the separate segment is only a minute or less long?

3. Does the program network producer need to edit out website addresses embedded in the closing credits for programs put in the can prior to Feb 1 2005, or whatever later date chosen by the FCC, if the program airs after the effective date of the website rule?

DOCUMENT OFF-LINE

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1 Cassette Tape